

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH JEFFEREY BRICE,

Defendant.

NO. CR-11-0075-LRS

**ORDER RE MAY 8 AND MAY 15,
2013 PRESENTENCING MOTIONS
HEARINGS**

BEFORE THE COURT, at the scheduled presentencing motions hearing on May 8, 2013, are the following defense motions: Defendant's Motion to Dismiss for 6th Amendment Rights and Privileges (ECF No. 380); and Defendant's Motion to Suppress (ECF No. 381). The Court made preliminary rulings during the May 8 hearing but allowed the parties to file supplemental briefing. The Court then made final rulings at the video-conference held with the consent of the parties on May 15, 2013. Having considered the parties' written and oral arguments, the Court enters this order to memorialize and supplement the Court's preliminary and final rulings on May 8 and May 15, 2013.

A. Defendant's Motion to Dismiss

Defendant moves for a dismissal of the charges against him, based on alleged violations of his Sixth Amendment right to counsel, including violations of the attorney-client and work-product privileges. More specifically, Defendant asserts that during the jail

1 search, the Government reviewed and seized privileged material and,
2 as such, the Indictment should either be dismissed or all parties
3 participating in this matter, including this Court, the U.S.
4 Attorney's Office in Spokane and the U.S. Probation Office, should be
5 removed from further participation in the matter¹. Additionally,
6 Defendant asserts that the jail cell search constituted outrageous
7 Government conduct.

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9 The Government argues that Defendant has failed to identify any
10 specific seized material that qualifies as "Attorney-Client Privilege"
11 or "Work Product Privilege." The Government argues that Defendant
12 cannot show how Defendant Brice was prejudiced, even if the referenced
13 materials in Exhibit Nos. 1-11 in ECF No. 385 and attachments were
14 truly prepared by a party, representative, or agent in anticipation of
15 litigation or trial. However, defense counsel's motions focus only on
16 5 pages identified above and in footnote 1.

17 At the hearing, the Court closed the courtroom and heard argument
18 from Assistant U.S. Attorney Hicks. AUSA Hicks was instructed by the
19 court and AUSA Smoot to review materials deemed privileged by defense
20 counsel and to not reveal or discuss with AUSA Smoot those materials
21 (consisting of 5 pages) within the US Attorney's Office pending
22 further rulings from this court.
23

24 ¹Defense counsel acknowledges that any basis for recusal of the US
25 Attorney's Office, U.S. Probation and this court arise solely from
26 exposure to the 5 pages referenced in ECF No. 399.

1 Based on testimony from AUSA Hicks and defense counsel, the Court
2 concludes that at first blush, the 5 pages alleged to be
3 "Attorney-Client Privilege" or "Work Product Privilege" materials (ECF
4 No. 399), do not appear to be privileged. Only after testimony from
5 defense counsel, could one determine that the one handwritten page was
6 a journal entry prepared by Defendant at the request of his attorney.
7 Considering all 5 sealed pages however, none reveal strategy or, in
8 the alternative, are in any way of significance for sentencing
9 purposes or are otherwise prejudicial to the Defendant. Of note, the
10 documents seized were never disclosed to the government until after
11 the Ninth Circuit Court of Appeals refused to review the district
12 court's finding that none of the documents were privileged and
13 directed that this Court turn all of the seized documents over to the
14 parties in March, 2013, 6 months after Defendant pleaded guilty in
15 September 2012. To this day, U.S. Attorney Smoot asserts that he has
16 maintained separation within his office so as to not be privy to the 5
17 documents alleged to be violations of Defendant's Attorney-Client or
18 Work Product privileges and seemingly of great concern to defense.
19

20 This Court finds that the remedies Defendant seeks, namely
21 dismissal, and in the alternative, to recuse the U.S. Attorney,
22 Probation Office and this Court, are not justified by the facts of
23 this case. To the extent there was an inadvertent violation of any
24 privileged materials and such information is utilized in the
25 presentence report, Defendant's remedy is to file objections to such
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1 information, if any exists therein, and request any such information
2 be stricken. The government will have an opportunity to respond and
3 the Court will make rulings at the sentencing hearing.

4 **B. Defendant's Motion to Suppress**

5 Defendant also moves to suppress the evidence seized from the
6 jail cell search based on alleged violations of his Sixth Amendment
7 right to counsel, including violations of the attorney-client and
8 work-product privileges. Defendant leans on *United States v. Cohen*,
9 796 F.2d 20 (2nd Cir.1986) for suppression of the material seized from
10 his jail cell based on his belief that the prosecutor initiated and
11 directed the search of Brice's cell.
12

13 At the May 8, 2013 hearing, FBI Special Agent Bomb Technician
14 ("SABT") McEuen testified that the search at issue was neither
15 initiated nor directed by AUSA Smoot. Rather, after being advised by
16 a member of the Joint Terrorism Task Force ("JTTF") that the Defendant
17 and another alleged "bomber" (Wayde Kurt) were in contact with each
18 other, FBI SABT McEuen consulted with the Spokane County Jail and the
19 U.S. Marshal Service to coordinate two separate jail searches relevant
20 to the information FBI SABT McEuen had received. According to the
21 testimony, there is no evidence that the jail searches were conducted
22 to obtain evidence for a superseding indictment. In fact, according to
23 FBI SABT McEuen's testimony, AUSA Smoot was not even contacted about
24 the two jail searches until after the searches had been arranged and
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1 coordinated through the Spokane County Sheriff's Office and the U.S.
2 Marshal Service.

3 Notably, as the Government asserts, Defendant has no expectation
4 of privacy in his jail cell and thus the seized materials are not
5 subject to Fourth Amendment-based suppression. See *Hudson v. Palmer*,
6 468 U.S. 517, 526 (1984).

7 The Court finds that Defendant cannot show that a legitimate
8 expectation of privacy has been violated. The totality of the
9 circumstances and legitimate concerns for safety and investigation of
10 possible in house criminal activity justified the searches. This
11 Court finds that none of the material seized from the Defendant's cell
12 standing alone could readily be discerned as covered by attorney
13 client or work product privilege, with the possible exception of a
14 handwritten page that could be deemed Work Product after hearing
15 testimony from defense counsel that he told Defendant to maintain a
16 journal or diary to record his thoughts². As an appropriate remedy for
17 what may have amounted to an inadvertent violation of the privileges
18 asserted by Defendant for this handwritten document, Defendant may
19 object to any information gleaned from the document if mentioned or
20 used in the presentence report, and ask that it be stricken from the
21 report.
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24 ²Other materials found in the 5 pages at issue by themselves
25 (without the assistance of explanatory testimony) are too general in
26 nature to suggest that the attorney client privilege was violated.

1 **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion to Dismiss for 6th Amendment Rights and
3 Privileges, **ECF No. 380**, is **DENIED**. The charges against Defendant will
4 not be dismissed nor will all parties participating in this matter,
5 including this Court, the U.S. Attorney's Office, the U.S. Probation
6 Office and the Court, be recused from this case.

7 2. Defendant's Motion to Suppress, **ECF No. 381**, is **DENIED**.
8 Defendant may raise objections to any information in the presentence
9 report by having counsel communicate in writing to the probation
10 office any objections he may have as to factual errors, omissions, and
11 privileged information that should be stricken from such report due to
12 claimed violations of the attorney client privilege. If desired,
13 counsel for the defense may file his objections to the presentence
14 report dealing with matters raised in this order under seal to be
15 reviewed only by AUSA Hicks, U.S. Probation and the undersigned
16 judicial officer.
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18 3. The Sentencing Hearing on **June 6, 2013 at 9:00 a.m. in**
19 **Spokane, Washington REMAINS SET**. Defendant's sentencing memoranda,
20 including any and all objections to the presentence report, must be
21 filed and served **NO LATER THAN May 23, 2013**. The Government's
22 response, if any, shall be filed and served on or before **May 30, 2013**.
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24 4. On or before **June 3, 2013**, the probation officer shall submit
25 the presentence report to the sentencing judge.

26 **IT IS SO ORDERED.** The District Court Executive is directed to enter

1 this order and to provide copies to all counsel, the U.S. Probation
2 Office, the U.S. Marshal, and the Jury Administrator.

3 **DATED** this 17th day of May, 2013.

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5 ***s/Lonny R. Suko***

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LONNY R. SUKO
7 United States District Judge
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